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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

ABIJITH KARIGUDDAIAH, **Plaintiff and Appellant,** **v.** **US BANK NATIONAL ASSOCIATION et al.,** **Defendants and Respondents.**	**A134961** **(Contra Costa County Super. Ct. No. MSC1100910)**

Abijith Kariguddaiah appeals from a judgment of dismissal after an order sustaining respondents' demurrers to his amended complaint without further leave to amend. He contends the demurrers should not have been sustained, because his claims for wrongful foreclosure and quiet title are supported by his allegation that a document used in the nonjudicial foreclosure process was forged, and his claims are not barred by his failure to allege that he tendered the amount of his secured indebtedness. Kariguddaiah also contends that he should have been granted further leave to amend his pleading. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

Kariguddaiah defaulted on his mortgage obligations and, nearly two years later, was evicted from his home after a nonjudicial foreclosure sale. (See Civ. Code, §§ 2924-2924k.) He thereafter sued respondents in the instant case, contending that a signature on a substitution of trustee form had been forged. Because we review the court's order

sustaining demurrers and denying leave to amend, we set forth the relevant allegations of Kariguddaiah's original and amended complaints.

A. *Original Complaint*

According to Kariguddaiah's original complaint in this action, in October 2006 he signed and delivered a promissory note in the amount of $596,000 to Wells Fargo Bank, N.A. (Wells Fargo) in order to purchase a home (Property). He also signed and delivered a deed of trust on the Property in favor of Wells Fargo in order to secure the loan; the deed of trust identified Fidelity National Title Insurance Company (Fidelity National) as the trustee.

In August 2009, First American Loanstar Trustee Services (First American Loanstar), on Wells Fargo's behalf, caused the recording of a notice of default and election to sell the Property. The notice of default advised that Kariguddaiah had breached the obligations secured by the deed of trust by failing to pay monthly installments of principal and interest (beginning in May 2009), and that the beneficiary under the deed of trust (Wells Fargo) elected to sell the Property to satisfy the obligation.

In November 2009, First American Loanstar recorded a Substitution of Trustee, purportedly signed by "Chet Sconyers, Certifying Officer" on behalf of Wells Fargo, by First American Loanstar as attorney in fact. The Substitution of Trustee purported to replace Fidelity National with First American Loanstar as trustee under the deed of trust. However, Kariguddaiah alleges, the signature on the substitution of trustee is not actually that of Sconyers but, to the contrary, was "forged."

In June 2010, First American Loanstar recorded an assignment of the deed of trust from Wells Fargo to US Bank National Association as Trustee for CMLIT2007-AR8 (US Bank). The assignment was signed by "Robert Bourne, Certifying Officer" on behalf of Wells Fargo by First American Loanstar as attorney in fact. Kariguddaiah alleges, however, that the CMLIT2007-AR8 trust had closed in 2007.

In December 2010, it is alleged, First American Loanstar recorded a Notice of Trustee's Sale on the Property. In January 2011, Wells Fargo Home Mortgage recorded a

Trustee's Deed Upon Sale, evincing the purchase of the Property by US Bank. Eventually, US Bank initiated an unlawful detainer action against Kariguddaiah.[1]

1. *Causes of Action*

Kariguddaiah asserted a cause of action for "wrongful foreclosure," contending that respondents breached a duty to him by using forged documents to initiate a bogus sale of his Property. (Civ. Code, § 1708.) Specifically, he alleged, Wells Fargo caused foreclosure papers to be forged, US Bank accepted and relied upon the documents, and First American Loanstar relied upon them as well. Kariguddaiah also asserted a cause of action to quiet title. He sought a judicial declaration of his rights, injunctive relief, an accounting, statutory damages, compensatory damages, punitive damages, treble damages, prejudgment interest, attorney fees and costs, and other relief.

2. *Demurrers and Court's Ruling*

Respondents Wells Fargo and US Bank filed a joint demurrer to Kariguddaiah's complaint. They contended: (1) Kariguddaiah's action as to Wells Fargo is barred by res judicata, in that Kariguddaiah had previously sued Wells Fargo alleging wrongful foreclosure of the Property; (2) the action as to US Bank should have been filed in federal court, because Kariguddaiah's previous lawsuit against it had been removed to federal court and not remanded; (3) Kariguddaiah had no standing to assert the wrongful foreclosure claim without tendering what he borrowed against the secured property, he offered no facts to substantiate his claim of forgery, and no cause of action for fraud was properly alleged; and (4) a borrower may not quiet the title of secured property in his favor without repaying what he borrowed. The court overruled the demurrer as to the res judicata ground, but sustained the demurrer to both causes of action, with leave to amend,

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[1] Kariguddaiah also alleged the following legal conclusions: the falsification of Sconyers' signature rendered the Substitution of Trustee a "nullity;" the 2009 assignment of the deed of trust from Wells Fargo to US Bank was void and the attempted transfer of the Property was a nullity because the CMLIT2007-AR8 trust had closed in 2007; the Notice of Trustee's Sale was void because the Substitution of Trustee was forged; and the Trustee's Deed Upon Sale was void because it was not issued by a trustee with legal title to the Property at the time of its issuance.

on the grounds that the legal conclusion of forgery was not supported by allegations of fact and Kariguddaiah failed to allege tender of the secured debt.

Respondent First American Loanstar demurred on the grounds that Kariguddaiah failed to make the required tender and the trustee's deed created a rebuttable presumption that the sale was conducted properly. The court also sustained First American Loanstar's demurrer with leave to amend.

B. *First Amended Complaint*

In September 2011, Kariguddaiah filed his first amended complaint, again asserting causes of action for wrongful foreclosure and quiet title. The amended complaint repeated the allegations of the original complaint, and still did not allege that Kariguddaiah tendered the amount of the secured debt. But it did add allegations that a comparison with official records from the State of Texas established that Sconyers did not sign his name on the Substitution of Trustee.

1. *New Allegations*

Specifically, in paragraph 11 of his amended complaint, Kariguddaiah alleged that Sconyers is a Texas notary public, the State of Texas maintains copies of his signature on his notary oath and bond, and a comparison of his "true" signature on those documents to the signature on the Substitution of Trustee confirmed that the signature on the Substitution of Trustee was a "forgery." Consequently, Kariguddaiah alleged, the notarization of the signature must also be false and fraudulent. And, because other recorded documents from other sales bore Sconyers' forged signature, respondents' practice was to use forged and fabricated documents in their foreclosure sales because they do not have the legal or equitable right to foreclose.

Kariguddaiah also attached an *unsigned* "Affidavit of Peggy Walla" to his amended complaint as Exhibit A. The document states that Peggy Walla, purportedly a "Forensic Document – Handwriting Examiner, Texas Licensed Private Investigator," concluded that "the questioned purported signatures of Chet Sconyers as seen on the above listed questioned documents labeled Q1 through Q5 [including the Substitution of Trustee] are not the genuine signatures of Chet Sconyers." The document further states that Walla arrived at this

conclusion by comparing handwriting exemplars (provided to her by Kariguddaiah's attorney) to the Substitution of Trustee (Q5) and other documents; the known exemplars, however, are not attached to the purported affidavit despite the representation that they are.

Kariguddaiah alleged in his amended complaint that the "facts" in Exhibit A are "true and correct" and purported to incorporate those "facts" into his pleading. He further alleged that "worksheet comparison pages 1 and 2 compare Mr. Sconyers' true signatures with the forged signatures alleged herein, marking the fundamental differences between the genuine mark and the forgery," but those pages are nowhere to be found in Exhibit A. Nor is there any indication that Walla knows anything about Exhibit A, which she did not sign and is incomplete on its face, or how Kariguddaiah could possibly know whether the "facts" in the exhibit are true and correct.

2. *Demurrers to the First Amended Complaint*

Wells Fargo and US Bank filed a demurrer to Kariguddaiah's first amended complaint. As to the wrongful foreclosure cause of action, they again asserted that Kariguddaiah lacked standing because he failed to tender the amount of the secured debt and that Kariguddaiah failed to allege facts sufficient to state a forgery; they also asserted that a recorded substitution of trustee is conclusive evidence of the substituted trustee's authority to act. As to the quiet title cause of action, Wells Fargo and US Bank argued that a borrower may not quiet the title of secured property without repaying what he borrowed, and the claim was misplaced against Wells Fargo because it was not asserting any interest in the title.

First American Loanstar also demurred to the first amended complaint, contending that Kariguddaiah failed to make the required tender, failed to allege facts sufficient to support his contention that documents were forged, and failed to allege the elements of a quiet title cause of action. First American Loanstar further argued that it no longer had any interest in the Property since the foreclosure sale had already occurred.

3. *Court's Ruling*

The court sustained the demurrers of Wells Fargo and US Bank without leave to amend, for the reasons given by the court in its tentative ruling: as to the wrongful foreclosure cause of action, Kariguddaiah did not allege a credible tender of the amount of the secured debt; as to the quiet title cause of action, Kariguddaiah did not tender the

entire outstanding principal. The court found that the additional grounds for the demurrer were moot and dismissed the action as to Wells Fargo and US Bank.

The court also sustained the demurrer of First American Loanstar and dismissed the action with prejudice.[2]

This appeal followed.

II. DISCUSSION

Kariguddaiah contends the demurrers should not have been sustained and he should have been granted further leave to amend. We address each contention in turn.

A. *Sustaining of Demurrer*

In our de novo review of an order sustaining a demurrer, we assume the truth of all facts properly pleaded in the complaint or reasonably inferred from the pleading, but not mere contentions, deductions, or conclusions of law. (*Buller v. Sutter Health* (2008) 160 Cal.App.4th 981, 985-986 (*Buller*).) We then determine if those facts are sufficient, as a matter of law, to state a cause of action under any legal theory. (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.)

In order to prevail on appeal, an appellant must affirmatively demonstrate error. Specifically, the appellant must show that the facts pleaded are sufficient to establish every element of a cause of action and overcome all legal grounds on which the trial court sustained the demurrer. (*Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 879-880.) We will affirm the ruling if there is any ground on which the demurrer could have been properly sustained. (*Debro v. Los Angeles Raiders* (2001) 92 Cal.App.4th 940, 946 (*Debro*).)

1. *Wrongful Foreclosure*

As a threshold matter, we must consider that the foreclosure on Kariguddaiah's property was conducted pursuant to California's nonjudicial foreclosure statutes. (Civ.

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[2] Respondents had requested judicial notice of the Deed of Trust, the Notice of Default and Election to Sell Under Deed of Trust, the Substitution of Trustee, the Assignment of Deed of Trust, the Notice of Trustee's Sale, and the Trustee's Deed Upon Sale. The court granted the request as to the existence and recordation of the documents, but sustained Kariguddaiah's objections as to the truthfulness of the statements within the documents.

Code, §§ 2924-2924k.) These statutes provide "a comprehensive scheme designed '(1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.' [Citation.] As a result, a nonjudicial foreclosure sale is *presumed to have been conducted regularly*, and the burden of proof rests with the party attempting to rebut this presumption. [Citations.]" (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 270 (*Fontenot*), italics added.) Thus, the burden fell squarely on Kariguddaiah to plead facts demonstrating the impropriety of the foreclosure.

To support his purported cause of action for "wrongful foreclosure," Kariguddaiah alleged that respondents violated Civil Code section 1708, in that Wells Fargo "caus[ed] foreclosure papers to be forged to complete a bogus sale," US Bank accepted and relied upon the documents, and Loanstar relied upon them as well. Civil Code section 1708 reads: "Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights."

At the heart of Kariguddaiah's claim is his allegation that the signature on the Substitution of Trustee naming First American Loanstar as trustee in place of Fidelity National was "forged." Kariguddaiah does not dispute that Wells Fargo had the authority to substitute trustees under the terms of the deed of trust; rather, he contends that the signature on the Substitution of Trustees "is NOT that of Chet Sconyers, and is forged, rendering the document a nullity." As a result, he urges, First American Loanstar did not become the trustee and lacked the authority to record the notice of trustee's sale and conduct the sale.

For several reasons, Kariguddaiah fails to state a cause of action.

a. failure to allege that the signature and substitution were unauthorized[3]

In his amended complaint, Kariguddaiah alleged that Sconyers did not sign the Substitution of Trustee, and further alleged that a comparison of his signature in the official records of the State of Texas with the signature on the Substitution of Trustee confirms that he did not sign the substitution and the notarization of his signature is therefore false and fraudulent. For purposes of the demurrers, we will accept as true the factual allegation that someone other than Sconyers signed what purports to be Sconyers' signature on the Substitution of Trustee.[4]

The assumed fact that someone besides Sconyers signed his name on the Substitution of Trustee, however, is not enough. As a general matter, signing someone else's name is legally significant only if it was unauthorized and perpetrated with fraudulent intent. (See Pen. Code, § 470 [forgery requires signer's intent to defraud and knowledge that he or she lacks authority to sign the name of another person]; *Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 387 [crime of forgery under Pen. Code, § 470 derives from common law definition of forgery].) In this regard, Kariguddaiah does not allege that the signature, even if made by someone besides Sconyers, was made without Sconyers' permission, or that the actual signer intended to perpetrate a fraud.

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[3] Kariguddaiah posits that, because the trial court's order sustaining the demurrers to the amended complaint relied solely on the tender rule, while the order sustaining the demurrers to the original complaint had stated that he failed to plead forgery sufficiently, the court must have determined that the forgery was sufficiently alleged in the amended complaint. The argument is untenable, since the court expressly stated that all grounds for the demurrer other than the tender rule were "moot." That is, the court did not reach, and did not need to reach, the adequacy of the forgery allegations because it found the tender rule was sufficient to sustain the demurrers. In any event, our review is de novo.

[4] Kariguddaiah's Exhibit A to the amended complaint – the unsigned, unverified and incomplete "affidavit" of a "Peggy Walla" asserting that the purported signatures of Sconyers are not genuine – is immaterial. Kariguddaiah alleges in his amended complaint that the "facts in the declaration attached as Exhibit A are true and correct" and that he incorporates these "facts" as his own. To the extent he attempts to incorporate an expert opinion that the signature is not real, the effort of course fails. To the extent he means to incorporate the "facts" on which the unsigned document says Walla relied, Exhibit A adds nothing helpful to the allegations already in the amended complaint.

Furthermore, the fact that someone other than Sconyers signed the Substitution of Trustee is legally significant to Kariguddaiah in *this* case only if it means that the principal for whom Sconyers signed – ultimately, Wells Fargo – did not authorize the signature and Substitution of Trustee. After all, the sole capacity in which Sconyers purportedly signed the Substitution of Trustee was as the Certifying Officer on behalf of First American Loanstar as attorney in fact for Wells Fargo, and the sole purpose of his signature was to represent that Wells Fargo – the party undisputedly empowered to substitute trustees – was in fact substituting trustees. Because Sconyers' signature was merely to bind Wells Fargo, either Sconyers could authorize someone else to sign his name for him, or *Wells Fargo* could authorize someone else to sign his name for him, on Wells Fargo's behalf. Thus, if Sconyer's name was signed by someone else to bind Wells Fargo *without* Wells Fargo's authorization, there might be no valid substitution of trustees; but if Wells Fargo had *authorized* the signer to sign Sconyer's name on behalf of Wells Fargo, it cannot be said that the substitution of trustees was outside the scope of the power held by Wells Fargo to change trustees, unenforceable against Wells Fargo, or otherwise invalid.

Kariguddaiah does not allege who signed Sconyers' name on the Substitution of Trustee. Nor does he allege when it happened, or how. He does not allege that the document was signed, or the substitution of trustees was effected, without Wells Fargo's authorization. More particularly, he fails to allege that the signer was not acting with Sconyer's permission, or with Wells Fargo's permission, or as Wells Fargo's agent (where, for example, another Wells Fargo employee or agent might have signed on Sconyer's behalf within the scope of the agent's authority), or with the permission of an agent of Wells Fargo (like First American Loanstar) within the scope of its authority. On this basis, Kariguddaiah's pleading is insufficient.

Moreover, while Kariguddaiah makes the conclusory allegation that the signature was a "forgery," other allegations in his pleading assert definitively that the signature *was* authorized by Wells Fargo. Kariguddaiah's wrongful foreclosure cause of action against Wells Fargo is premised on the allegation that Wells Fargo "*caus[ed]* foreclosure papers

to be forged." (Italics added.) This allegation can only mean that Wells Fargo purportedly caused someone to sign Sconyers' name, which in turn can only mean that the signature was *authorized* by Wells Fargo and was therefore *not* a "forgery" on which Kariguddaiah could base his wrongful foreclosure action. In fact, Kariguddaiah alleges that Wells Fargo had a practice, as part of its "day-to-day operations," to have someone sign Sconyers' name on its behalf.[5] Thus, by Kariguddaiah's own allegations, he negates any inference that the Substitution of Trustee was unauthorized or failed to effect the substitution of First American Loanstar as trustee.

Kariguddaiah's arguments to the contrary are meritless. Primarily he relies on *Cutler* v. *Fitzgibbons* (1906) 148 Cal. 562 (*Cutler*), but *Cutler* actually seals his fate.

In *Cutler*, the defendants had claimed they owned plaintiff's land by virtue of a deed, purportedly signed by the plaintiff, to the defendants. The plaintiff sought to quiet title, alleging in her complaint that she did not sign any such deed or authorize anyone to sign it for her, and her signature was in fact forged. (*Cutler, supra*, 148 Cal. at p. 563.) After the plaintiff prevailed in the trial court, one of the defendants appealed, contending that the complaint was deficient because it had not alleged with requisite specificity the facts constituting a fraud. (*Ibid*.) The appellate court rejected this argument, because the plaintiff was not trying to set aside a deed on the ground it was procured by fraud, but merely attempting to quiet title to the land she already legally owned. (*Id*. at pp. 563-564.) Moreover, the court added, the allegations that the deed was not signed or executed by the plaintiff, "or by *any other person authorized by her to execute it*," and was forged, would be sufficient. (*Id*. at p. 564, italics added.)

Cutler is of course distinguishable on its facts, because the plaintiff in that case sought relief on the ground that someone had forged her own name on a deed to transfer her property to someone else, while here Kariguddaiah seeks relief on the ground that

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[5] Further, the first amended complaint alleges that each respondent was the "agent or employee" of each other and was "acting within the course and scope of such agency or employment." From this allegation, it must be inferred that, if any respondent besides Wells Fargo authorized the signature of Sconyers' name, it suffices as Wells Fargo's authorization, and the signature could not be an actionable forgery.

someone forged another person's name on a substitution of trustee form on the bank's behalf. But if any lesson may be gleaned from *Cutler*, it is that Kariguddaiah has failed the test set up by the very precedent he cites: while Kariguddaiah alleges that Sconyers did not sign the substitution of trustee form, he *fails* to allege that the substitution was not signed "by any other person authorized by [Sconyers, Wells Fargo, or by First American Loanstar as Wells Fargo's attorney in fact] to execute it." (*Cutler, supra,* 148 Cal. at p. 564.) To the contrary, he alleges the exact opposite.

b. ratification by Wells Fargo and US Bank

In a related argument, Wells Fargo and US Bank contend they conferred authority on the signer (or approved the substitution of trustees) by ratifying the true signer's act of signing Sconyers' name (and the substitution of trustees) after the fact. (Civ. Code, § 2307.) As they point out, "a principal may ratify the forgery of his signature by his agent," such that the agent is deemed to have the requisite authority at the time he signed. (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73-74.) After the Substitution of Trustee was recorded, new trustee First American Loanstar signed the assignment of Wells Fargo's interest on behalf of Wells Fargo as its attorney in fact; and later the notice of trustee's sale was served and recorded, the sale was held, and the trustee's deed conveying the property to US Bank was recorded. There is no allegation that Wells Fargo or US Bank objected to the documents or to the corresponding steps of the foreclosure process, or was unaware of them; to the contrary, it is alleged that US Bank bought the Property at the foreclosure sale.

Kariguddaiah did not address this argument in his appellate brief. At oral argument, he asserted that ratification was not raised by Wells Fargo or US Bank in the trial court, and that there was no ratification by him or by Wells Fargo or US Bank. Nevertheless, the allegations of his pleading contend that Wells Fargo caused the purported forgery (and thus knew about it) and show no objections by Wells Fargo to the subsequent acts of First American Loanstar as trustee. Furthermore, it is alleged that Wells Fargo signed through its agent the subsequent assignment of the deed of trust to US Bank (which identified First American Loanstar as trustee), thus providing written

ratification of First American Loanstar's substitution as trustee. The inference from his amended complaint, therefore, is that a ratification occurred and his pleading states no cause of action.

c. recorded substitution of trustee is conclusive evidence of authority to act

Even if Kariguddaiah had alleged facts to show that the signature on the substitution of trustees was a forgery and not authorized or ratified by Wells Fargo, he could not recover for harm caused by the forged Substitution of Trustee as a matter of law.

Civil Code section 2934a, subdivision (d) provides: "A trustee named in a recorded substitution of trustee shall be deemed to be authorized to act as the trustee under the mortgage or deed of trust for all purposes from the date the substitution is executed by the mortgagee, beneficiaries, or by their authorized agents. Nothing herein requires that a trustee under a recorded substitution accept the substitution. *Once recorded, the substitution [of trustee] shall constitute conclusive evidence of the authority of the substituted trustee or his or her agents to act pursuant to this section*." (Italics added.)

"Conclusive evidence" cannot be contradicted by any evidence to the contrary. (*Pullen v. Heyman Bros*. (1945) 71 Cal.App.2d 444, 452.) It is therefore tantamount to a substantive rule of law. (Cf. *Federal Deposit Ins. Corp. v. Superior Court* (1997) 54 Cal.App.4th 337, 346 [a conclusive presumption is not a rule of evidence but substantive rule of law].) Thus, a recorded substitution of trustee establishes the authority of the substituted trustee to act.

Here, the Substitution of Trustee was recorded. The trial court properly took judicial notice of its recordation. (See *Fontenot, supra,* 198 Cal.App.4th at p. 265.) As a matter of law, therefore, First American Loanstar had authority to act as the trustee under Kariguddaiah's deed of trust, to record the notice of sale, to conduct that sale, and to issue the trustee's deed to US Bank.

Kariguddaiah argues that, if we accept the Legislature's directive in Civil Code section 2934a, subdivision (d), county clerks will record forged instruments and turn

"California's land records into the Wild West, with forgers recording transfer documents at will and then claiming that the forgeries cannot be challenged and are legitimized by the purported presumptions." But there are, of course, safeguards against this: forgery is a crime (Pen. Code, § 470) and, more specifically, it is a felony to present a forged substitution of trustee for recording (Pen. Code, § 115).

At any rate, it is not our role to second-guess the Legislature's determination that the authority of a substituted trustee should be conclusively established by recordation of the substitution – particularly since the rule ostensibly furthers public policy by promoting the finality of trustee sales and the marketability of real property, at little peril to the borrower. Indeed, the genuineness of the signature on a Substitution of Trustee form is relevant only to whether the lender authorized a change of trustee; yet who the trustee is makes no difference to the borrower (*U.S. Hertz, Inc. v. Niobrara Farms* (1974) 41 Cal.App.3d 68, 85), the note and deed of trust permit initiation of the nonjudicial foreclosure process no matter who the trustee is, and the substitution of trustees does not adversely affect the borrower's default, failure to cure, or ability to redeem the property as long as the successor trustee, named in the recorded substitution, follows the statutory process. At least under the allegations in Kariguddaiah's amended complaint, it would be reasonable to conclude that lawsuits contending that Substitution of Trustee forms were signed by someone other than the signatory would "fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures." (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1155.)

Civil Code section 2934a precludes Kariguddaiah's wrongful foreclosure claim, based on the Substitution of Trustee, as a matter of law.

d. no wrongful foreclosure claim based on assignment of deed of trust

Kariguddaiah's first amended complaint alleged that Wells Fargo's assignment of the beneficial interest in the deed of trust to US Bank, as trustee of a certain trust, was void because the trust was closed before the assignment. Kariguddaiah fails to demonstrate, however, that the allegation is sufficient to state a cause of action.

First, even if the assignment of the beneficial interest in the deed of trust occurred after the trust was closed, Kariguddaiah did not allege that his *loan* was not conveyed to US Bank before the trust closed. Second, even if the trust closed in 2007, there is no allegation that US Bank did not exist or did not have the legal capacity to accept the beneficial interest in the deed or, ultimately, purchase the Property. Third, Kariguddaiah does not rely on this allegation in his opening brief, and therefore has waived any argument that it could support a cause of action for wrongful foreclosure notwithstanding the deficiencies we have noted. (*Davies v. Sallie Mae, Inc*. (2008) 168 Cal.App.4th 1086, 1096; *Christoff v. Union Pacific Railroad Co*. (2005) 134 Cal.App.4th 118, 125.)

e. the tender requirement bars Kariguddaiah's foreclosure claim

As a general rule, a plaintiff may not challenge the propriety of a foreclosure on his or her property without offering to repay what he or she borrowed against the property. (*Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117 [judgment on the pleadings properly granted where plaintiff attempted to set aside trustee's sale for lack of adequate notice, because "[a] valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust"] (*Karlsen*). See *United States Cold Storage v. Great Western Savings & Loan Assn.* (1985) 165 Cal.App.3d 1214, 1222-1223 ["the law is long-established that a *trustor* or his successor must tender the obligation in full as a prerequisite to challenge of the foreclosure sale"].) This rule originated from the principle that, before asking a court to exercise its equitable powers to stop or set aside foreclosure proceedings, a defaulting borrower must first "do equity" himself. (*F.P.C.I. RE-HAB 01 v. E & G Investments, Ltd*. (1989) 207 Cal.App.3d 1018, 1021 [tender rule is based on equitable maxim that a court of equity will not order a useless act performed . . . if plaintiffs could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to the plaintiffs].)

This tender rule is strictly enforced. (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 439.) Absent an alleged tender, a complaint seeking to set aside foreclosure

proceedings fails to state a viable cause of action. (See *Karlsen, supra*, 15 Cal.App.3d at p. 117.) Kariguddaiah did not allege that he made such a tender.

Kariguddaiah contends that the tender rule does not apply here for two reasons. First, he contends the rule is inapplicable because he seeks monetary relief as well as equitable relief. He is incorrect. With certain exceptions addressed *post*, the tender rule applies to *any* cause of action that is based on allegations of wrongful foreclosure, seeks redress from foreclosure, or is "implicitly integrated" with a foreclosure, whether it seeks equitable relief or monetary relief. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1109 [no claim against Standard Trust Deed Service for unlawfully failing to postpone a foreclosure sale, because "appellants are required to allege tender of the amount of . . . secured indebtedness in order to maintain any cause of action for irregularity in the sale procedure"]; *Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 579 [demurrer properly sustained without leave to amend as to junior lienor, who sought to set aside a nonjudicial foreclosure sale *and* obtain damages for a defect in the notice based on a wrongful foreclosure claim, as well as damages for fraud and negligence, where the junior lienor had not alleged that it tendered the full amount to the senior lienor].)

Second, Kariguddaiah contends the tender rule does not apply because the foreclosure sale in this case was "void ab initio" based on the falsification of Sconyers' signature on the Substitution of Trustee. He argues that, while a plaintiff must rely upon equity to overcome a voidable sale, he need not rely upon equity in setting aside a void sale; and since he does not rely upon equity, he is not required to tender amounts due under the note.

The short answer to Kariguddaiah's argument is that, for reasons stated *ante*, Kariguddaiah has not alleged facts sufficient to show that the Substitution of Trustee – let alone the deed or transfer of the Property to U.S. Bank – was void ab initio. On that basis, the exception he cites to the tender requirement does not apply, and his failure to allege a tender is fatal to his cause of action. A longer answer is that the cases on which Kariguddaiah relies are inapposite.

Kariguddaiah relies primarily on *Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868 (*Dimock*). In *Dimock*, a lender recorded a substitution of trustee that substituted Calmco Trustee Services, Inc. (Calmco) as the trustee of record in place of the original trustee under the deed of trust on Dimock's home. (*Id*. at p. 872.) Thereafter, the original trustee (through its agent) nonetheless recorded a notice of trustee's sale, conducted the trustee's sale, and sold the property to a new owner, who initiated an unlawful detainer action against Dimock. (*Id*. at pp. 872-873.) Dimock then sued the lender, the past and present trustees, and others for declaratory and injunctive relief, quiet title, and damages, contending that the notice of sale was improper and the substitution of trustees rendered the sale by the past trustee void. (*Id*. at p. 873.)

The appellate court in *Dimock* held that the recording of the substitution of trustee transferred to Calmco the exclusive power to conduct a trustee's sale. (*Dimock, supra,* 81 Cal.App.4th at p. 875.) Because the original trustee had no power to convey the property, its deed to the buyer was void (a complete nullity with no force or effect) rather than merely voidable (which may be set aside by the intervention of equity). (*Id*. at p. 876.) The court recognized that, in the context of overcoming a voidable sale, the debtor must tender any amounts due under the deed of trust, because one who relies on equity to overcome the voidable sale must show that he can perform under the contract so that equity is not employed for an idle purpose. (*Id*. at pp. 877-878.) But "[b]ecause there was no recital in the [original trustee's] deed to [the buyer] which undermined the Calmco substitution, the deed to [the buyer] did not create any conclusive presumption that [the original trustee] continued to act as trustee. Accordingly, in attacking the [original trustee's] deed Dimock was not required to rely upon equity in setting aside a merely voidable deed. [Citation.] Rather, he could rely on the face of the record to show that the [original trustee's] deed was void. [Citation.]" (*Id*. at p. 878.) On that basis, the court concluded, Dimock did not have to tender the amount of the indebtedness in order to obtain relief: "Because Dimock was not required to rely upon equity in attacking the deed, he was not required to meet any of the burdens imposed when, as a matter of equity, a party wishes to set aside a voidable deed. [Citation.] In particular, contrary to

the defendants' argument, he was not required to tender any of the amounts due under the note." (*Ibid*.)

Dimock is obviously distinguishable from the matter at hand. In *Dimock*, the foreclosure was void because the trustee who gave notice and sold the property had been divested of all authority, as a matter of law, to take those actions, in light of the recorded substitution of trustees. The deed was therefore void on its face. (*Dimock, supra*, 81 Cal.App.4th at pp. 874-876.) Here, by contrast, it is not alleged that the trustee who gave notice and sold the Property had been divested of all authority by recordation of the Substitution of Trustee; to the contrary, it is alleged that the foreclosure sale was conducted by the company – First American Loanstar – that *was* named as the successor trustee in the recorded Substitution of Trustee. Under the allegations of Kariguddaiah's amended complaint, the deed is not void on its face, and the *Dimock* exception to the tender requirement does not apply.

Kariguddaiah also relies on *Lona* v. C*itibank, N.A.* (2011) 202 Cal.App.4th 89 (*Lona*). There, Lona's home was sold at a nonjudicial foreclosure sale. Lona sued the lender, the loan servicer, and others to set aside the trustee's sale, claiming he was a victim of predatory lending in that the loan broker ignored his inability to repay the loan and Lona, lacking fluency in English, did not understand many of the details of the transaction. The lender and loan servicer obtained summary judgment on the ground that Lona failed to tender the amounts due on the loan. (*Id*. at pp. 95, 98-99.)

The court of appeal reversed the grant of summary judgment on the ground there were issues of material fact and the lender and loan servicer had not addressed a potential exception to the tender requirement. The court confirmed that a borrower must usually make a tender to maintain an action to set aside a trustee's sale on the ground it is voidable due to irregularities in the sale notice or procedure, but that an exception to the tender requirement arises when the borrower need not rely on equity to attack the deed because the "trustee's deed is *void on its face* [citing *Dimock, supra*, 81 Cal.App.4th at

p. 878]." (*Lona, supra*, 202 Cal.App.4th at pp. 112-113, italics added.)[6] Lona's complaint had alleged both irregularity in the foreclosure process and *illegality of the underlying contracts*, which the lender and loan servicer *had failed to address* in their summary judgment motion. (*Id*. at pp. 114-115.) It was on *that* basis that the court concluded that Lona's failure to tender did not compel summary judgment: "We hold that [respondents] did not meet their burden of showing that Lona could not state a cause of action to set aside the trustee's sale on the ground that he could not establish the tender requirement because their motion did not address the exceptions to that element that Lona relied on in his complaint." (*Id*. at p. 115.)

Lona is inapposite. Unlike the respondents in *Lona*, respondents here have not failed to address any exception to the tender requirement made apparent by Kariguddaiah's pleading. Moreover, in contrast to the borrower in *Lona*, Kariguddaiah did *not* allege that the documents underlying his loan were illegal, invalid, or void. *Lona* provides no authority for Kariguddaiah's proposition that a Substitution of Trustee signed by someone other than the signatory creates an exception to the tender requirement.

For each of the independent reasons set forth *ante*, the trial court did not err in sustaining the demurrers as to Kariguddaiah's purported cause of action for wrongful foreclosure.[7]

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[6] The court in *Lona* recognized three other exceptions to the tender rule, not applicable here: (1) where the borrower's action attacks the validity of the underlying debt; (2) the person who seeks to set aside the trustee's sale has a counterclaim or setoff against the beneficiary; and (3) it would be inequitable to impose such a condition on the party challenging the sale. (*Lona, supra*, 202 Cal.App.4th at pp. 112-113.)

[7] Wells Fargo and U.S. Bank contend that the court's sustaining of their demurrer to Kariguddaiah's amended complaint may also be affirmed because his claims are barred by res judicata, arising from a prior action in which Kariguddaiah alleged improprieties with the foreclosure. However, the trial court in this case rejected the res judicata argument with respect to the original complaint and, more importantly, Wells Fargo and U.S. Bank *did not assert* res judicata as a basis for their demurrer to the *amended* complaint. Therefore, we will not (and need not) consider res judicata in determining whether Kariguddaiah's amended complaint states a cause of action. On the other hand, the res judicata arguments asserted in respondents' appellate briefs are germane to

2. *Quiet Title Cause of Action*

Kariguddaiah's second cause of action sought to quiet title, based on his contention that the foreclosure was void and no title transferred because First American Loanstar was not properly substituted in as trustee.

A borrower cannot quiet title to secured property without alleging that he paid the debt secured by the property. (E.g., *Miller v. Provost* (1994) 26 Cal.App.4th 1703, 1707 ["a mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee"]; *Aguilar v. Bocci* (1974) 39 Cal.App.3d 475, 477.) It would be inequitable to quiet title in Kariguddaiah's name without requiring him to repay the secured loan he obtained to purchase the property, since he would effectively obtain a $596,000 windfall merely because a Substitution of Trustee form was signed on Wells Fargo's behalf by someone other than the named representative. (See *Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 526.)

Kariguddaiah counters that he is only seeking to quiet title to the Property *subject to* the encumbrances as they existed at the time of the foreclosure sale. Therefore, he argues, the absence of a tender of the secured indebtedness does not bar his claim. That is *not*, however, what Kariguddaiah alleges in his amended complaint.

In any event, for reasons stated *ante*, Kariguddaiah has not alleged a wrongful foreclosure or sale of the Property. The amended complaint therefore fails to allege any basis to quiet title in Kariguddaiah, with or without the encumbrances, and accordingly fails to allege a cognizable claim to quiet title.

The court did not err in sustaining the demurrers to Kariguddaiah's cause of action to quiet title. Furthermore, Kariguddaiah does not assert that the allegations of his amended complaint state any other cause of action. Accordingly, the demurrers were properly sustained as to the entirety of his amended complaint.

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whether it would be futile to allow Kariguddaiah to amend his pleading further to state a cause of action. Kariguddaiah does not substantively address respondents' res judicata arguments in his appellate brief, providing further reason to conclude that there is no basis to overturn the trial court's denial of leave to amend. (See *post*.)

B. *Denial of Leave to Amend*

We review a denial of leave to amend for an abuse of discretion. (*Debro, supra*, 92 Cal.App.4th at p. 946.) To prevail on appeal, an appellant must usually demonstrate a reasonable possibility that the defects in the complaint can be cured by amendment. (E.g., *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; see *Vaca v. Wachovia Mortgage Corp*. (2011) 198 Cal.App.4th 737, 743.) Thus, Kariguddaiah must show how the amended complaint could further be amended and how, as so amended, the pleading would state a cause of action. (*Buller, supra,* 160 Cal.App.4th at p. 992.)

Kariguddaiah fails to demonstrate how he could further amend his complaint to state a cause of action. The allegations of the amended complaint do not suggest any possibility that an amendment would cure its defects; to the contrary, Kariguddaiah's allegations disprove that the Substitution of Trustee was effected without Wells Fargo's authorization. He has had multiple opportunities in the trial court to allege facts sufficient to state a cause of action, and even now he fails to show what amendment he would make or why it would cure the deficiencies of the complaint.

Kariguddaiah states in his opening brief: "Here, it is submitted that any perceived defects in Kariguddaiah's claims may be cured by amendment. For example, while Kariguddaiah maintains that it is not needed or required, further detail regarding Sconyers' forged signature can be alleged. Kariguddaiah can elaborate more on how this case is virtually identical to *Dimock* so as to further confirm that the tender rule does not bar his claims. To the extent that this Court deems that there are equitable claims in Kariguddaiah's complaint that require tender, he can either remove those claims, leaving only damage claims to which the tender rule does not apply, or allege an appropriate tender."

Based on this proffer, as well as the allegations of the amended complaint, Kariguddaiah's prior opportunity to amend, and the arguments in his appellate brief, Kariguddaiah has not demonstrated any reasonable possibility that the defects of his pleading

can be cured by amendment, and the court did not abuse its discretion in denying him further leave to amend.[8]

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.

[8] In its respondent's brief, First American Loanstar seeks sanctions against Kariguddaiah for filing a frivolous appeal. The request does not comply with rule 8.276 of the California Rules of Court. We will therefore deny the request.